

Louisiana Law Review

Volume 43 | Number 2

Developments in the Law, 1981-1982: A Symposium

November 1982

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Repository Citation

H. Alston Johnson, *Successions and Donations*, 43 La. L. Rev. (1982)

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SUCCESSIONS AND DONATIONS

H. Alston Johnson*

LEGISLATION

Compared to the 1981 legislative session, the work of the 1982 session in the field of successions and donations was exceptionally calm. Some of the legislature's work was of a housekeeping nature, resolving the conflict it created in 1981 as to the usufruct which could be granted to the surviving spouse over separate property¹ and declaring retroactive the amendments which eliminated the right of forced heirs to pursue donated property in the hands of the donee's onerous transferees.² Another act similarly eliminated the right of forced heirs to pursue immovable property which was the subject of a donation *omnium bonorum* in the hands of an onerous transferee from the donee,³ and yet another act clarified the exclusion of life insurance proceeds from calculation of the active mass under article 1505 by specifying that the premiums paid to secure those proceeds also were

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1. 1982 La. Acts, No. 445, § 1, *amending* LA. CIV. CODE art. 890. Acts 911 and 919 of the 1981 Regular Session were in substantive conflict on the question of testamentary authority to grant a usufruct to the surviving spouse over separate property. Act 911 was the more expansive of the two, permitting the testator to grant a usufruct to his surviving spouse over all or part of his separate property, regardless of the existence of an inheriting heir. Act 919 was more limited, authorizing such a usufruct only when the property was inherited by issue of the marriage with the survivor or by illegitimate children. Act 445 in effect reenacts Act 911 and the more expansive language. For a discussion of the details of the conflict, see Samuel, *The 1981 Regular Legislative Session: Successions, Donations, Matrimonial Regimes, and Family Law*, 29 LA. B.J. 115 (1981).

See also Act 183 of 1982, which authorizes use of formulas in testaments intended to permit Louisiana citizens to take maximum advantage of the federal estate tax marital deductions permitted under the Economic Recovery Tax Act of 1981.

2. Act 535 of 1982 makes expressly retroactive from September 11, 1981 the changes in the Civil Code made by 1981 La. Acts, No. 739 to provide that forced heirs can no longer pursue donated property into the hands of onerous transferees. See Samuel, *supra* note 1, at 118. The primary thrust of the 1981 amendments was indubitably at immovable property, but not all of the amended articles are so limited.

3. 1982 La. Acts, No. 641, § 1, *amending* LA. CIV. CODE art. 1497. Failure to have so provided during the 1981 legislative session, when the right of forced heirs as to other donations was eliminated, may simply have been an oversight. Act 641 provides that although there is no action against the onerous transferee to recover the property, the forced heir has an action for its value against the donee. Even Act 641 has not completely eliminated the title problems with regard to donated immovable prop-

not to be included in the calculation.⁴ All of these acts were effective on the general effective date for legislation of the 1982 Regular Session, September 10, 1982.

Effective upon the governor's signature on July 21, 1982, was Act 448, amending articles 1302, 1573, and 1725 of the Civil Code to permit a decedent to delegate authority to an executor to allocate specific assets to satisfy a legacy expressed in terms of quantum or value or to satisfy the forced portion. This appears to be an acceptable approval of the equivalent of a limited power of appointment recognized by the French law.⁵ A parent or other ascendant already has under the provisions of the Civil Code the authority to designate the precise assets in his or her estate to be given to each of his children or other descendants.⁶ The present amendments permit him to fix the amount or fraction for such persons, but assign the actual determination of assets to the discretion of the executor. The amendments also permit persons other than parents or other ascendants a similar power, *i.e.*, any testator may authorize his executor to "fill out" the designated amount or fraction with appropriate assets.

As written, the amendments do not run afoul of the traditional Louisiana abhorrence of broad powers of appointment.⁷ The power of appointment was well established at Roman law and in pre-

erty. Louisiana Civil Code article 1568, for example, authorizes the donor to regain donated property "[i]n case of revocation or rescission on account of the non-execution of the conditions" imposed on the donation free of real rights created upon it, even in the hands of third persons. It was not amended by either 1981 La. Acts, No. 739, or 1982 La. Acts, No. 641.

4. 1982 La. Acts, No. 356, *amending* LA. CIV. CODE art. 1505. The act continues the principle of the 1981 amendment which deems the proceeds, when received by a forced heir, as a credit against his forced share. It does not specifically include within the amount of that credit the amount of the premiums paid.

5. *See generally* 10 C. AUBRY & C. RAU, DROIT CIVIL FRANCAIS §§ 655-56 (6th ed. Esmein 1954) in C. LAZARUS, 3 CIVIL LAW TRANSLATIONS 87-95 (1969); 3 M. PLANIOL, CIVIL LAW TREATISE pt. 2, nos. 2741-45 at 341-42 (11th ed. La. St. L. Inst. trans. 1959).

6. LA. CIV. CODE arts. 1302 & 1724. The French Civil Code has a provision virtually identical to the latter article. C. CIV. art. 1075 (*partage d'ascendant*). *See* 3 M. PLANIOL, *supra* note 5, nos. 3348-3400.

7. *See* LA. CIV. CODE art. 1573, which, prior to its amendment by Act 448 of 1982, provided:

The custom of willing by testament, by the intervention of a commissary or attorney in fact is abolished.

Thus the institution of heir and all other testamentary dispositions committed to the choice of a third person are null, even should that choice have been limited to a certain number of persons designated by the testator.

There is no similar provision in the French Civil Code, but the cases appear to have severely limited the power of appointment, at least in so far as the identity of the legatee is concerned. *See* sources cited in note 5, *supra*. In effect, Louisiana's article

revolutionary France, but was restricted somewhat thereafter.⁸ Louisiana's stated rule prohibits leaving the choice of a legatee completely to a third person without any conditions or criteria from which the determination is to be made or to so large a group that the determination is for all practical purposes impossible. The present amendments require the testator to choose the legatee with the usual precision, as well as the amount or fraction which he is to receive. Only the choice of the particular assets to carry out that intention are left to the executor, presumably for reasons related to federal estate tax planning.⁹

Act 452 effects much-needed reform in the area of donations *inter vivos* of negotiable instruments. Louisiana Revised Statutes 10:3-201(4) is enacted to provide that such donations are governed by those provisions of the Uniform Commercial Code adopted in Louisiana, rather than by the Civil Code. Thus donative transfers of negotiable instruments will be controlled by the principles of negotiability established by the U.C.C., rather than by the Civil Code's requirement of an authentic act for such transfers unless the exception for donations of a corporeal movable through manual delivery under article 1539 is applicable. The act is expressly "remedial and retroactive" and should eliminate the confusing and highly unsatisfactory treatment of such donations in the jurisprudence.¹⁰ Law school examinations in successions and donations will no longer be as much fun for the examiner, but clearly the arcane cannot be retained solely for the perverse enjoyment of the academicians.

Four acts made minor amendments to the Trust Code. Act 423 defines "annual exclusion" for purposes of future annual additions to a trust to be the dollar amount of the exclusion from federal gift tax

1573 codified the French jurisprudence. However, even within the French jurisprudence, there is disagreement, since the testator may be able to circumvent the rule by writing the disposition in terms of a bequest with a charge. See 3 M. PLANIOL, *supra* note 5, no. 2745 at 342 n.130.

8. 3 M. PLANIOL, *supra* note 5, no. 2743 at 341. In particular, the choice of a legatee left to a spouse was prohibited.

9. See Hickey, *Post Mortem Estate Planning with Partial Disclaimers*, 29 LA. B.J. 74 (1981).

10. See Note, *Donation—Optional Payment Homestead Stock May Be the Subject of a Manual Donation*, 30 LA. L. REV. 153 (1969); Note, *Donations—Delivery of Check Is Incomplete Gift Until Drawer Loses Power of Revocation*, 42 TUL. L. REV. 669 (1968). See generally *Succession of Miller*, 405 So. 2d 812 (La. 1981) (especially the opinion of Dixon, C. J., dissenting from opinion on rehearing); *Fontenot v. Estate of Vidrine*, 401 So. 2d 584 (La. App. 3d Cir. 1981) ("gift" of promissory note invalid for want of authentic form when value given exceeded by one-half the value of the services for which it may have been compensation). See also *Bergeron v. Bergeron*, 411 So. 2d 1183 (La. App. 4th Cir. 1982) (no actual delivery of deposited funds to son, and therefore no donation to son).

in effect in the year in which the donation is made to the trust.¹¹ Act 479 expands the group of relatives for whom a class trust may be created to include nieces, nephews, grandnieces, and grandnephews.¹² Act 435 repeals Louisiana Revised Statutes 9:1784, which provided that there always had to be one trustee who was neither a settlor nor a beneficiary. Act 455 authorizes a trust instrument to provide that the interest of a principal beneficiary who is a descendant of the settlor will vest in one or more of the settlor's descendants who are in being and ascertainable on the date of death of the principal beneficiary, should that beneficiary die intestate without descendants during the trust or at its termination.¹³

Other acts related to the field of successions and donations are treated in more detail in other portions of this year's symposium.¹⁴

JURISPRUDENCE¹⁵

The most important subject in this year's term is a chapter yet unfinished at this writing: retroactivity of the decision in *Succession*

11. 1982 La. Acts, No. 423, § 1, adding LA. R.S. 9:1937.

12. 1982 La. Acts, No. 479, § 1, amending LA. R.S. 9:1891 (Supp. 1964).

13. 1982 La. Acts, No. 455, § 1, amending LA. R.S. 9:1975 (Supp. 1964) & adding LA. R.S. 9:1978.

14. Act 425 of 1982 requires the clerk of court to "record, in the public records every judgment of filiation . . . which recognizes a father as having, either formally or informally, acknowledged an illegitimate child and in which the father is adjudged the parent of the child." Such a judgment is to be recorded in the conveyance records and shall be "effective against third persons from the date of recordation." Act 527 of 1982 changes the standard of proof in a filiation action when the alleged parent is deceased to "clear and convincing evidence" from the present "preponderance of the evidence." The lesser standard is retained for actions instituted while the alleged parent is still alive. These two acts are discussed in Spaht, *Developments in the Law, 1981-1982—Persons*, 43 LA. L. REV. 535 (1982).

15. Not discussed in this symposium but worthy of note are *Osterland v. Gates*, 400 So. 2d 653 (La. 1981) and *Ridgway v. Ridgway*, 102 S. Ct. 49 (1981), both concerning the treatment of United States Savings Bonds. In *Osterland*, the use of co-owner bonds by a mother to favor one daughter over another was held not to be "fraud" under federal law and the decision in *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964). The court reasoned that the mother could have avoided collation under state law simply by designating the bonds as "extra portions," and thus the argument that the mother had committed "fraud" under *Yiatchos* by accomplishing something under federal law that she could not accomplish under state law was without merit.

In *Ridgway*, some doubt was cast upon the continuing validity of the exception made in *Yiatchos* to federal predominance on the question of disposition of United States Savings Bonds if "fraud" is established under state law. A divorcing father in *Ridgway* had promised to keep serviceman's life insurance in force for his children but remarried and designated his new spouse as the beneficiary. The court distinguished *Yiatchos*, holding that no fraud was shown, although breach of contract was.

Additionally, during this term the supreme court affirmed the decision of the Second Circuit Court of Appeal in *Succession of Williams*, 418 So. 2d 1317 (La. 1982),

of *Brown*.¹⁶ The *Brown* decision needs no introduction to regular readers of this portion of this symposium. Its holding on state and federal constitutional grounds in 1980 that Louisiana could not discriminate between legitimate children and proven biological illegitimate children in intestate successions caused considerable discussion. Even more discussion and litigation, however, has been produced by the tantalizing question of the retroactive effect, if any, of the court's decision.

Various dates for application of the decision have been suggested, some of them discussed in this forum last year. Three dates are most frequently mentioned and have the strongest arguments to support them:

- (1) the effective date of the 1974 Louisiana Constitution (midnight, December 31, 1974), on the theory that article 14, § 18(B) declared that laws in conflict with the constitution "shall cease" upon its effective date;¹⁷
- (2) the date of the Supreme Court's decision in *Trimble v. Gordon*¹⁸ (April 26, 1977), on the theory that Louisiana's intestate scheme was effectively unconstitutional from that point

reh'g denied (Sept. 17, 1982), *aff'g* 405 So. 2d 336 (La. App. 2d Cir. 1981). In that case, the decedent's son had renounced the succession, apparently with the intent that his two children would thereby receive his share, and that the other half of the succession would go to the decedent's daughter, who would accept. Pleadings to that effect were filed by the respective parties, but subsequently the daughter sought to have the judgment of possession corrected to show that she should have received all of the succession to the exclusion of the son's children. The appellate court ultimately denied her request, as did the supreme court. The case at the appellate level was discussed in last year's symposium by Professor Le Van. Le Van, *Developments in the Law, 1980-1981—Trust and Estates*, 42 LA. L. REV. 454, 465-66 (1982).

16. 388 So. 2d 1151 (La. 1980), *cert. denied*, 450 U.S. 998 (1981).

17. LA. CONST. art. 14, § 18(B): "Laws which are in conflict with this constitution shall cease upon its effective date." Language of this type originated in the Louisiana Constitution of 1898, apparently in an attempt to end immediately the voting rights of blacks. See Report of Thomas Kernan to Louisiana Bar Association, PROCEEDINGS OF THE LOUISIANA BAR ASSOCIATION 54, 55 (1898-1899) (discussing the constitutional convention of 1898), commenting on the background of article 325 of the Louisiana Constitution of 1898. The language was continued in article 326 of the Louisiana Constitution of 1913 and in article 22, section 1 of the Louisiana Constitution of 1921. Decisions interpreting these articles suggest that they are self-actuating, *i.e.*, they cause the effective repeal of conflicting statutes without any specific enactment of the legislature. See *Succession of Lith*, 149 La. 977, 981, 90 So. 364, 365 (1921); *State v. Pearson*, 110 La. 387, 395, 34 So. 575, 578 (1903); *cf. Smith v. Police Jury of St. Tammany Parish*, 153 La. 961, 967, 96 So. 824, 826 (1923). The early interpretations of the 1974 provision suggest the same conclusion: conflicting statutes ceased upon the effective date of the constitution. See *State v. James*, 329 So. 2d 713 (La. 1976); *Civil Service Comm'n of New Orleans v. Foti*, 349 So. 2d 305 (La. 1977). An analysis of these issues is contained in an unpublished student seminar paper by Smith, *If Words Mean What They Say*, (Nov. 26, 1981) (Paul M. Hebert Law Center, Louisiana Constitutional Law Seminar).

18. 430 U.S. 762 (1977).

forward, although not directly challenged in that litigation;¹⁹ and (3) the date of the *Brown* decision itself (September 3, 1980), which of course would be a nonretroactive application, except to the litigants in the *Brown* case.²⁰

Even after the choice of an effective date, other imponderables remain. Should the decision apply to the successions of those who die after that date? Could it apply to deaths before that date if the matter is pending upon the effective date? And regardless of the date chosen, could a distinction be made between testate and intestate succession or between rights now held by third parties and those rights still within "the family"?

Conflicting signals have been given by our appellate courts on these and other matters. A case in which some of these issues might be resolved by the supreme court—*Succession of Clivens*²¹—is before that court on rehearing as of this writing. Thus these remarks necessarily must be limited to a summary of the present decisions and the caution that later pronouncements of the supreme court must be considered along with this discussion.

At the outset, there was general agreement among the circuit courts that *Brown* should be given only prospective effect from the date it became final (September 3, 1980).²² The supreme court, however, granted writs in two of these cases. During the same time, the supreme court was indirectly indicating that complete retroactivity, even as to third persons, might be a possibility. In *Smith v. Stephens*,²³ a claimant sought recognition as the illegitimate (adulterous) child of a man who died in 1957. She named as defendants not only the legitimate heirs but also several purchasers of property from those

19. See especially *id.* at 776 n.17, in which the Court, no doubt in response to the argument that it had earlier upheld the Louisiana scheme in *Labine v. Vincent*, 401 U.S. 532 (1971), which was similar to the Illinois scheme it was now striking down, stated: "[W]e have examined the Illinois statute more critically than the Court examined the Louisiana statute in *Labine*. To the extent that our analysis in this case differs from that in *Labine*, the more recent analysis controls."

20. The decedent in *Brown* died on a convenient date: January 1, 1978.

21. ____ So. 2d ____, No. 82-C-0125 (La. July 2, 1982), *reh'g granted* (Sept. 3, 1982). The appellate opinion is reported at 406 So. 2d 790 (La. App. 4th Cir. 1981).

22. See *Succession of Ross*, 397 So. 2d 830 (La. App. 4th Cir. 1981); *Succession of Clivens*, 406 So. 2d 790 (La. App. 4th Cir. 1981); *Succession of Layssard*, 412 So. 2d 135 (La. App. 3d Cir. 1982); *Villanueva v. Schwall*, 408 So. 2d 1186 (La. App. 4th Cir. 1982); *Harlaux v. Harlaux*, 411 So. 2d 581 (La. App. 1st Cir.), *writ granted*, 414 So. 2d 380 (La. 1982). There were some deviations from that position, however. See *IMC Exploration Co. v. Henderson*, No. 37,807 (La. 11th Dist. Ct. July 8, 1981) (applied *Brown* retroactively). On appeal to the Second Circuit Court of Appeal, the result was reversed on the ground that the claimants had failed to discharge the burden of proof on the filiation issue. 419 So. 2d 490 (La. App. Cir. 2d 1982).

23. 412 So. 2d 570 (La. 1982).

legitimate heirs. One of those purchasers held property from a 1971 sale and filed a dilatory exception of prematurity on the ground that the plaintiff had not first proved her filiation to the decedent. That exception was sustained, and that ruling was affirmed on appeal.²⁴ The supreme court granted a writ, presumably to determine whether or not the action of filiation could be joined with a request for recognition of rights (even against third-party purchasers) based on that filiation. The court held that the actions could be joined. Moreover, it observed that the petition would be subject to an exception of no cause of action if plaintiff had not alleged facts to support filiation and that such an exception should be granted if she could not prove her filiation. But if she were successful in proving her filiation, the court said that "the grounds for the exception will be removed, and the suit may proceed."²⁵ There were no dissents.

There is an inherent suggestion in the *Smith* opinion that an illegitimate child born in 1952 who could filiate herself to a father who died in 1957 has a right to attack the inheritance of property by legitimate heirs to her exclusion and to attack the sale of that property to third persons in 1971. If this does not give complete retroactive effect to *Brown*, it is difficult to imagine what will. The court in *Smith* told the plaintiff, in effect, that she could proceed with her attack if she could establish filiation. If in fact the court later would take the position that she could have no rights even if filiated to the decedent because he had died 9 years before *Brown* was rendered, it should have said so. It is hardly fair to send the plaintiff down to go through the motions of filiation if upon her return to the supreme court, it will be held that she has no cause of action because *Brown* is prospective only.

Against that mysterious background, the supreme court issued its original opinion in *Succession of Clivens*.²⁶ George Clivens died in 1971. His widow was sent into possession of his estate in 1974. Upon her death in 1978, her collateral relations sought possession of her property, including the estate of her husband. Contending that she was the acknowledged illegitimate daughter of George Clivens, Dorothy Clivens Vantress intervened in the widow's succession proceedings. If she was correct and if *Brown* was applied retroactively without restriction, she, rather than the widow, would have been entitled to the husband's estate.

The trial court had sustained an exception of no cause of action

24. *Smith v. Stephens*, 401 So. 2d 674 (La. App. 3d Cir. 1981).

25. 412 So. 2d at 574.

26. ____ So. 2d ____, No. 82-C-0125 (La. July 2, 1982).

to the intervention, and the court of appeal had affirmed.²⁷ The supreme court noted in its opinion on original hearing that two important interests were in competition. The first of these was the interest of those holding rights in the property, acquired on the basis of the law in force at the time of their acquisition, which denied rights to acknowledged illegitimate children of a man as against his spouse. The other interest was of those "illegitimates in the same situation as the *Brown* plaintiffs," who would be treated unequally if pure prospectivity of *Brown* were decreed.

Based on the "far reaching effect" of *Brown* and the uncertainty it would engender in the area of property titles, where stability is so important, the court concluded that "its complete implementation" must be prospective. However, that holding did not prevent "certain limited retroactive exceptions." The court reasoned that only the interests of third persons required the protection of a prospective application and that *Brown* could be applied retroactively "as to co-heirs in intestate successions." Thus it announced prospectivity of the decision as to "third parties and testate successions."

The court considered and rejected the argument, espoused by Justice Dennis in his dissent, that *Brown* should be effective as to no successions prior to the effective date of the 1974 constitution and as to all successions (*i.e.*, deaths) after its effective date.

The result in the instant case on original hearing was that the intervenor could proceed against the claimants to the widow's succession on the ground that the widow was a co-heir and not a third person.

There were three dissents, and as of this writing, the matter is awaiting argument on rehearing.

Whatever decision the court might reach upon rehearing will only begin to clear the air. Other problems are waiting in the wings. Even if the Dennis dissent becomes a majority opinion, is there still room for a retroactive application when the property in question is still held "in the family," neither partitioned nor alienated in any way? What role will the prescriptive periods upon such claims²⁸ and the time limits on filiation actions themselves play?²⁹ Will an allegation of fraud sweep aside the ordinary prescriptive periods?³⁰

27. Succession of Clivens, 406 So. 2d 790 (La. App. 4th Cir. 1981).

28. See LA. R.S. 9:5630 (Supp. 1981).

29. See 1980 La. Acts, No. 549 and 1981 La. Acts, No. 721 and the excellent discussion of these problems in Spaht, *supra* note 14, and in Spaht, *Developments in the Law, 1980-1981—Persons*, 42 LA. L. REV. 403 (1982).

30. See Succession of Hearn, 412 So. 2d 692 (La. App. 2d Cir.), *cert. denied*, 415 So. 2d 215 (La. 1982).

PROHIBITED SUBSTITUTIONS

During this term, the supreme court made its first effort at interpreting a troublesome paragraph in the testament in *Succession of Goode*,³¹ which was discussed at the appellate level in last year's symposium by Professor Le Van.³² The court found itself divided 3-1-3 and ultimately granted a rehearing. The opinion on rehearing has not been handed down as of this writing and will have to await treatment in next year's symposium.

The testator in question died without ascendants or descendants, survived only by a half brother and the descendants of a predeceased half sister. He left an olographic will with several specific dispositions but no residuary legacy. The contested paragraph read as follows:

Fifth: All oil & gas royalty interest payments owned by me shall be paid to Pauline Egbert Parker for as long as she might live. After her death the amount of any payments shall be equally divided between my nieces and nephews and Linda Cosby Paine.³³

Opponents of the testament sought to annul it entirely or at least to annul that disposition, upon the ground that it was a prohibited substitution. The appellate court had agreed that the disposition was a prohibited substitution,³⁴ but it correctly held that only the disposition and not the entire testament was invalid.³⁵

In the original opinion, Justice Lemmon commanded three votes for his position that the legacy was of a usufruct to Pauline Parker and on equal division of the naked ownership to the nieces, nephews, and Linda Paine. Thus the disposition was authorized under Civil Code article 1522,³⁶ and the appellate court's contrary result was reversed.

Chief Justice Dixon dissented, although his view nonetheless would have upheld the disposition against the argument that it was a prohibited substitution. He reasoned that there were successive usufructs to the named legatees and naked ownership in the intestate heirs since no specific disposition of the naked ownership had been made. Two justices were of the opinion that the legacy was a prohibited substitution, and thus they would have affirmed the appellate decision.

31. ____ So. 2d ____ No. 81-C-1114 (La. Mar. 26, 1982), *reh'g granted* (May 7, 1982).

32. Le Van, *supra* note 15, at 462.

33. No. 81-C-1114, slip op. at 1.

34. 395 So. 2d 875, 878 (La. App. 2d Cir. 1981).

35. See *Succession of Walters*, 261 La. 59, 259 So. 2d 12 (1972), in which the erroneous position that a prohibited substitution invalidates the entire testament containing it was firmly and finally rejected. This position has died hard.

36. LA. CIV. CODE art. 1522: "The same [validity] shall be observed as to the disposition *inter vivos* or *mortis causa*, by which the usufruct is given to one, and the naked ownership to another."

Since a rehearing has been granted, no further discussion of the merits will be undertaken here.

MARITAL PORTION

The interesting decision in *Breaux v. Domingues*³⁷ involves the application of the marital portion articles in somewhat more modest circumstances than those to which we are ordinarily accustomed. The claimant was the second wife of the decedent. His first marriage ended when his spouse died, leaving two children of the marriage. The second marriage lasted from 1962 to 1978, and there were no children of that marriage. The only asset of any value in the decedent's estate was the \$75,000 home which had been the matrimonial domicile during the second marriage. It was the decedent's separate property.

His two children were granted possession of the property and ultimately sold it. Subsequently, the widow sued them for the marital portion under article 2382 of the Civil Code (now article 2432). She made the necessary allegations of living in necessitous circumstances as opposed to the relative prosperity in which her husband died. It was shown that she subsisted mostly on social security payments and that she had savings and checking accounts worth less than \$2,000.00 in the aggregate.

The defendants argued, on the basis of a decision by the Louisiana Fourth Circuit Court of Appeal,³⁸ that there had been no "change of lifestyle" for the claimant from that which she had enjoyed prior to her husband's death. The court rejected the argument, correctly placing more emphasis upon a comparison between the state of "common enjoyment of wealth and the position which it gives" which the couple had prior to the husband's death and the "penurious circumstances" to which the widow had been reduced after his death. The court also rejected the argument that the social security payments were the equivalent of the income interest on some \$25,000.00, which would have placed the widow below the customary 5 to 1 ratio thought necessary to establish a right to the marital portion. The court particularly seemed impressed by the fact that although the couple had lived in the home for sixteen years, it had been "snatched away" from her within a few months of the husband's death.

The appellate court thus reversed the trial court's rejection of the plaintiff's claim for a usufruct over one-fourth of the estate. In this instance, since the house had been sold, she was entitled to an award of some \$18,820.00 in usufruct without the necessity of posting

37. 407 So. 2d 1369 (La. App. 3d Cir. 1982).

38. Succession of Ziifle, 378 So. 2d 500 (La. App. 4th Cir. 1979).

security.³⁹ Since money is a consumable, she was then presumably entitled to have the money deposited to her name and to use both principal and interest as she saw fit, subject to an accounting at the termination of the usufruct.⁴⁰

TESTAMENTS

Form

With one exception, the major decisions in this term have exhibited considerable leniency toward the requirements of form for testaments. In *Succession of Dugas*,⁴¹ some of the decedent's legal heirs attacked the validity of her one-page statutory testament. She had signed at the bottom of the page after the dispositive provisions and after the attestation clause as well. The heirs argued unsuccessfully in both the trial and appellate courts that her signature had to follow the dispositive provisions but precede the attestation clause, despite the fact that the applicable statute required only that the signature be "at the end of the will."⁴² Spurious arguments of this type have plagued the statutory testament almost from its inception.⁴³ Cautious notaries have responded by having the testator sign both the end of the dispositive provisions (as well as at the bottom of each page, of course, in a multiple-page testament) and at the end of the attestation clause. The most recent amendments to the statutory testament provisions attempt to make it clear that such duplication is unnecessary.⁴⁴ The dispositive provisions of the testament are what primarily concern the testator, and as to which we require the testator's affirmance by a signature or its equivalent with an explanation. This is our assurance that the testament is an accurate reflection of the testator's wishes. So long as the signature is located beneath the dispositive provisions and affixed in time after they are

39. The usufruct created by LA. CIV. CODE art. 2432 is a legal one under LA. CIV. CODE art. 544, and thus no security is required under the provisions of LA. CIV. CODE art. 573.

40. LA. CIV. CODE arts. 536 & 538.

41. 400 So. 2d 333 (La. App. 4th Cir.), *cert. denied*, 404 So. 2d 1257 (La. 1981).

42. LA. R.S. 9:2442, prior to and after its amendment by 1980 La. Acts, No. 744.

43. There was a plausible basis for the argument under the language of the statute as originally enacted by Act 66 of 1952. As it then read, LA. R.S. 9:2442(3) required the facts of confection to be "evidenced in writing above the signatures of the notary public and witnesses and the testator at the end of the will." Later versions of the statute clarified that the testator should sign the testament itself, and the witnesses and notary should sign the attestation clause. *See* 1980 La. Acts, No. 744 & 1976 La. Acts, No. 333.

44. LA. R.S. 9:2442(B)(1) now provides that the testator is to signify or declare that the document is his testament and then sign his name "at the end" and on each other separate page. LA. R.S. 9:2442(B)(2) provides in a separate paragraph that the witnesses and notary are supposed to sign the required attestation clause.

written, we are permitted to infer the testator's approval.⁴⁵ It makes absolutely no difference that the testator's signature is also beneath the attestation clause. The latter clause is of no particular concern to the testator, and indeed we are not interested in his assertion as to the procedure followed in confection of the testament. The attestation clause is for the witnesses and notary to affirm what has taken place in their presence. Perhaps overly cautious notaries will continue to require the testator to sign both at the end of the dispositions and at the end of the attestation clause. This unnecessary formality can only continue to lead to litigation over an irrefutable principle: barring other problems with a disposition, it is valid if it appears above the signature of the testator, on that page and other pages.

The dissatisfied heirs in *Dugas* presented another and more troubling argument, although it was given short shrift by the appellate court. The decedent apparently needed a magnifying glass to read print the size of that used in her testament, and she did not have such an aid that day. Accordingly, it seemed conceded that she did not actually read the testament when she signed it. Citing an earlier decision on virtually identical facts,⁴⁶ the court held that this did not mean she was "not able to read" (which would have invalidated the testament as confected by one not authorized to bequeath by such a testament under the statute as it then read). The court's reasoning rests upon the proposition that inability to read in the statute meant illiteracy, not physical incapacity. In fact, the language could have meant both. Actual readings of the testament by the testator is the only test to assure that the document he signs contains his last will. The public or private nuncupative testament requires a public reading after an initial dictation in order to permit an illiterate testator to assure himself that the document does contain his last will.⁴⁷ The mystic testament envisions a reading by the testator as the security measure,⁴⁸ and an olographic testament obviously will be scrutinized by the testator for accuracy.⁴⁹ The 1980 amendments to the statutory testament provisions, although not applicable in *Dugas*, specify that the ordinary statutory testament may be confected only by one who "knows how to and is physically able to read."⁵⁰ These amendments

45. See *Succession of Fitzhugh*, 170 La. 122, 127 So. 386 (1930); *Succession of Dyer*, 155 La. 265, 99 So. 214 (1924); *Succession of Armant*, 43 La. Ann. 310, 9 So. 50 (1891).

46. *Succession of Harris*, 329 So. 2d 493 (La. App. 4th Cir.), *cert. denied*, 332 So. 2d 862 (La. 1976).

47. LA. CIV. CODE arts. 1578 & 1582.

48. LA. CIV. CODE arts. 1584 & 1586.

49. LA. CIV. CODE art. 1588.

50. LA. R.S. 9:2442, as amended by 1980 La. Acts, No. 744, now begins: "A statutory will may be executed under this Section only by a person who knows how to sign his name and knows how to and is physically able to read."

do not specifically require an actual reading on the day of confection, however.

If the testator does not know how to read, then obviously we cannot permit him to make a testament in which the only security precaution is his own perusal of the document. Under those circumstances, he does not have the option to assure himself of its accuracy. If the testator knows how to read but cannot do so on the day of confection because he does not have his glasses or magnifying glass, the same lack of security is present, even though he is literate. In the latter instance, however, he has chosen, at least by default, to put himself in a position in which he cannot verify the accuracy of the instrument. Perhaps it is then appropriate to distinguish the case of illiteracy from physical inability to read on the day in question, so long as the inability is traceable to the testator's own conduct.

Under the 1980 amendments, however, is such a person "physically able to read"? On that day, he clearly is not. And thus the verification technique chosen in Louisiana Revised Statutes 9:2442 is not available to him. Under the circumstances, he should be instructed to bring with him whatever is necessary for him to read and should be given the opportunity to read the testament. If he "cannot" read on that day because he does not have his glasses, some thought should be given to using the form specified by Louisiana Revised Statutes 9:2443 for sight-impaired persons. It calls for a reading of the testament in the presence of the testator—a verification device for those who are illiterate or sight-impaired.

If the inability to read is neither a literacy problem nor one traceable to the testator's failure to bring his glasses (as would be the case if a literate person were rendered temporarily blind by a stroke), the only sure solution is the use of Louisiana Revised Statutes 9:2443 and its required reading in the presence of the testator and the witnesses. That form of statutory testament is a hybrid between the public nuncupative testament and the ordinary statutory testament reserved for sighted, literate persons.

The second noteworthy case involving a statutory testament during this term was *Succession of Loeb*.⁵¹ In what would ordinarily be described as the dispositive provisions of the testament, there was included the following statement: "Because I am partially paralyzed and physically weak, but of sound mind and having all my mental capabilities, my signature may be shaky and illegible, I therefore make my mark."⁵² Following a recitation then of the date and place of the

51. 410 So. 2d 282 (La. App. 4th Cir.), *cert. denied*, 412 So. 2d 1094 (La. 1982) (Watson, J., dissenting from writ denial).

52. 410 So. 2d at 283.

will, the testator made an "X" on the line for his signature. There followed the standard attestation clause asserting in part that the testator had "signed" the instrument. This was followed again by his mark and by the signatures of the witnesses and the notary. The attestation clause did not contain any explanation of why an "X" was made on the two signature lines.

Opponents of the testament argued unsuccessfully in both the trial and appellate courts that the statute required that the explanation for such a mark be in the attestation clause as well as in the dispositive provisions of the testament. The appellate court correctly observed that at the time, the statute simply required that there be an explanation for the mark "in the act."⁵³ The "act" in that context is the entire instrument, and in any event the word should not be limited only to the attestation clause. Moreover, the court noted that the opponents' argument would require two explanations when the statute only called for one. The opponents also argued that since the statute contained a sample attestation clause reciting the testator's impairment, a statement in the dispositive provisions would be insufficient. However, provisions "substantially similar" to the attestation clause are permitted by the statute, and the court properly held that one explanation of the infirmity either in the dispositions or the attestation clause is sufficient.

The statute as last amended in 1980 continues these same provisions, and there is no reason why the court's sensible approach in *Loeb* should not continue to be authoritative.⁵⁴ So long as the "act" in its entirety explains why we find an "X" rather than a signature the purpose of the statute is satisfied. That purpose obviously is assurance that the "X" was made by the testator and not by another, from which we infer the testator's approval just as we would from his signature.

In *Johnson v. Succession of Johnson*,⁵⁵ the customary leniency shown to private nuncupative testaments was continued. The testatrix

53. LA. R.S. 9:2442, as amended by 1976 La. Acts, No. 333.

54. If anything, the present language is less restrictive. LA. R.S. 9:2442(C)(1) states that "[i]f the testator is unable to sign his name because of a physical infirmity," he "shall declare or signify . . . that he is unable to sign because of a physical infirmity, and shall then affix his mark." There is no specific requirement that there be "express mention" of his infirmity "in the act," although presumably it would be wise to mention it in the dispositive provisions, as in *Loeb*. The attestation clause is to contain the same declaration by the witnesses, *i.e.*, that the testator has declared or signified his physical infirmity in the statutory language or language substantially similar. As with all things of this nature, the safest thing to do is to follow the suggested attestation clause as written.

55. 405 So. 2d 639 (La. App. 3d Cir. 1981).

spoke only French, but could neither read nor write. All of the general requirements were followed. The testament was written in French at her direction and was read to the necessary five witnesses in that language. The objection of the opponents was that two of the five witnesses were not sufficiently fluent in the language to understand whether the instrument being read reflected what the testatrix had dictated. The appellate court agreed with the trial court that a sufficient understanding had been demonstrated, even though it could not be shown that the two witnesses were necessarily "fluent" in the language in the layman's sense. Certainly a witness must be able to understand the proceedings, since in a nuncupative testament the understanding of the witnesses is a major part of the verification and security process. The court was satisfied with the level of understanding on the basis of the evidence presented. The court found itself unwilling to agree that "formal schooling in French culminating in the ability to fluently write and speak same is a prerequisite to qualification as a witness to a French testament. If such were the law, few if any French testaments could be confected in this state."⁵⁶

In *Succession of Raiford*,⁵⁷ the customary leniency accorded to olographic testaments was insufficient to save the testament from invalidity. The testatrix had written a statutory testament in 1963. Upon her death in 1970, that will was offered for probate, and a judgment of possession based on the will was entered in late 1972. By a timely petition in 1976, the plaintiffs sought to annul that testament on the basis that a subsequent olographic testament had been discovered and should be probated. That testament was found "in a booklet"⁵⁸ and consisted of the following penciled notation:

Monday 8 1968
I wont gwen cooper
to have what I got when I died
My land and all
Melisa Raiford⁵⁹

There was evidence that the testatrix had limited education and that the writing appeared to be hers. However, other signatures in the record showed her name with a different spelling. Thus there was some indication that the notation might not actually have been in her handwriting. None of the courts, however, decided the case on that ground, and thus we must treat the case as one in which the testament was written and signed in the hand of the testatrix.

56. *Id.* at 642.

57. 404 So. 2d 251 (La. 1981).

58. Intended to be an index of phonograph records.

59. 404 So. 2d at 252.

The trial court dismissed the plaintiffs' suit, noting simply that the purported testament was not "the last will and testament of the deceased." The appellate court reversed, observing that the eighth day of the month occurred on a Monday only in February, April, and July of 1968 and concluding from a notation in the same book on another page and from other evidence that the writing took place in the summer.⁶⁰ It thus held that the document was entirely written, dated, and signed in the hand of the testatrix and should have been admitted to probate.

The supreme court reversed. It recognized the principle, established in *Succession of Boyd*,⁶¹ that extrinsic evidence could be admitted to establish the certainty of an ambiguous date, but it noted that the only thing certain about the date in question was the year and the "8" might refer to either the month or the day. The court doubted the strength of the extrinsic evidence used to support the conclusion that the testament was written in the summer, since no witness could say that the testatrix actually wrote in the booklet in that summer. The subsequent notation in the booklet, although dated July 8, was not shown to have been written on the same day as the earlier "half-dated" message.

Justice Lemmon dissented on the ground that the primary purposes of the requirement that an olographic testament be dated are to determine the mental competency of the testatrix and to decide which of two wills might supersede the other. There was no serious contention of lack of competency. Thus the only question was whether this testament was made after the 1963 statutory testament. He found the will to be sufficiently dated for that purpose.⁶² Thus he would have upheld the testament and affirmed the appellate court's decision.

There is considerable merit in Justice Lemmon's reaction to the case. Whatever else might be said about the "date" of the testament, it was clearly written some time during 1968. If the court was unwilling to hold that the testament was not in the handwriting of the testatrix and signed by her, then its problem with the validity of the testament must have been this date. The majority's position attaches to the requirement of dating an olographic testament an importance in the abstract, rather than with reference to the purpose for which the requirement exists.

60. *Succession of Raiford*, 393 So. 2d 398 (La. App. 1st Cir. 1980).

61. 306 So. 2d 687 (La. 1975) (holding that a slash date of "2/8/72" was sufficiently certain to allow extrinsic evidence to be admitted to establish whether it was February 8 or August 2).

62. He noted that "[t]he date or point in time, of course, can be more clearly expressed, even beyond the month and day." 404 So. 2d at 254 n.1.

One need not state the extreme holding that the "date" required by article 1588 is only the designation of the year in order to validate the testament in question. One need only say that the "date" must be sufficient to resolve those controversies present in the case and for which the requirement of a date was intended. If in another case there are conflicting testaments apparently written in the same year and one is "dated" only with the year, then its date is insufficient in that case and it must be ruled invalid. A "date" sufficient to validate in one case may not be sufficient to validate in another case, depending upon the issues to be resolved in the case at hand.

None of this is intended to suggest that lawyers should recommend that clients who wish to write olographic testaments may date them only with the year. Clearly, the usual advice of a fully-written date should be given. However, when a testament such as this one is written without legal assistance, perhaps the strong public policy favoring validity of testaments (especially those in olographic form)⁶³ should lead the court to consider the purpose of the dating requirement in context.

Legatee as a Witness

In *Evans v. Evans*,⁶⁴ a legatee was permitted to sign a statutory testament as a witness. The will was probated without incident, and a judgment of possession was rendered. When one of the other legatees sought to sell some of the property adjudged to him, the title was questioned on the ground that the entire will might be invalid due to the fact that a legatee was permitted to sign as a witness. The prospective seller sought a declaratory judgment upholding the will as valid, either in its entirety or at least as to all those legacies not involving the legatee-witness. In the alternative, if the testament was declared invalid, he and the other legatees sought damages for malpractice against the preparing notary and his insurer. By agreement of the parties, however, the latter claim was deferred until a resolution of the issue of validity of the testament.

Both the trial court and the appellate court held that only the legacy to the legatee who signed as a witness was invalid and that the remainder of the testament was valid.⁶⁵ This result validated title to the property in the prospective seller.⁶⁶ The appellate court reasoned

63. See *Carter v. Succession of Carter*, 332 So. 2d 439 (La. 1976), and authorities cited therein.

64. 410 So. 2d 729 (La. 1982).

65. *Evans v. Evans*, 399 So. 2d 721 (La. App. 1st Cir. 1981).

66. The accomplishment of this result may be observed in other famous succession cases, which actually may have influenced the outcome. See *Paline v. Heroman*,

that the statutory testament provisions referred specifically only to Civil Code articles 1591⁶⁷ and 1592,⁶⁸ relative to qualifications of witnesses. And since article 1595,⁶⁹ which contained the sanction of total invalidity of the testament, was not referred to, its sanction could not be applied. Thus the appellate court fashioned its own sanction: only the legacy to the witness was invalidated.⁷⁰

The supreme court reversed. The court properly reasoned that the provisions of the Civil Code should be integrated into the statutory will provisions wherever the latter are incomplete. Accordingly, since the statutory will provisions incorporated the prohibitions of articles 1591 and 1592 but contained no specific sanctions for violation of those prohibitions, the prohibition otherwise provided in the Civil Code should apply. Thus the court concluded that the testament had to be declared invalid in its entirety, as that was the clear wording of article 1595 of the Civil Code.⁷¹

The result is harsh, and there were three dissents. No doubt the result reached by the lower courts seems to accomplish greater justice in the case, and yet the legislation is quite clear. The proponents of

211 La. 64, 29 So. 2d 473 (1946) (court's conclusion that surviving spouse rather than grandchildren was heir "in the next degree" upon renunciation of child had the effect of validating the title to the property in a prospective seller); *Brant v. Terrill*, 141 So. 837 (La. App. 2d Cir. 1932) (court's resolution of collation issue, which was really a reduction issue, had the effect of validating title which had been attacked and required purchaser to pay promissory notes given in exchange for property).

67. LA. CIV. CODE art. 1591 (as it appeared prior to 1979 La. Acts, No. 711): "The following persons are absolutely incapable of being witnesses to testaments:

1. Children who have not obtained the age of sixteen years complete.
2. Persons insane, deaf, dumb or blind.
3. Persons whom the criminal laws declare incapable of exercising civil functions.
4. Married women to the wills of their husbands."

Acts 711 deleted the fourth prohibition.

68. LA. CIV. CODE art. 1592: "Neither can testaments be witnessed by those who are constituted heirs or named legatees, under whatsoever title it may be."

69. LA. CIV. CODE art. 1595: "The formalities, to which testaments are subject by the provisions of the present section, must be observed; otherwise the testaments are null and void."

70. 399 So. 2d at 723. The court offered no legislative authority for that sanction but reasoned by analogy from an earlier case involving a residuary legacy to the notary who received the testament. *Succession of Purkert*, 184 La. 792, 167 So. 444 (1936). Complete invalidity of the testament was not sought by the litigants in that case; they only sought invalidation of the legacy to the notary.

71. The court rejected the argument that the problem could be solved by the renunciation of the legacy by the witness. It observed that the witness had not offered to do that and that in any event his earlier unconditional acceptance might prevent him from doing so. The court distinguished *Lee v. Kincaid*, 359 So. 2d 232 (La. App. 2d Cir. 1978), *cert. denied*, 360 So. 2d 198 (La. 1978), in which a formal renunciation prior to trial was held to "cure" the invalidity.

the testament also found no support in the French commentators.⁷²

Even a reference to the reason for the prohibition may not be sufficient to save such a testament. Presumably, the prohibition is aimed at securing disinterested testimony as to the confection of the testament. If the validity of a legatee's gift rests upon his testimony as to the ceremony surrounding the confection of the testimony, there is the danger that he will not be truthful. On the surface, it appears that the invalidation of his own legacy will be sufficient to eliminate the potential conflict of interest. However, in light of the fact that in most testaments the legacies are in favor of persons who are related by blood or affinity or who are at the very least well acquainted with each other, the conflict of interest does not necessarily disappear because the legatee-witness will no longer take under the testament. Simply because he no longer claims under the testament, the legatee-witness is not automatically a disinterested spectator. He may want the other legacies to be valid.

Withal, the problem requires legislative attention. It may be that the sanction, although rationally related to the objective, is too extreme. Perhaps a middle ground not unlike the appellate court's position may be adopted, but it will have to come from the legislature.

Revocation

In two cases decided during this term, revocation of a testament by physical destruction at the hands of the testator was recognized. In *Succession of Brumfield*,⁷³ it was undisputed that the testator executed a valid statutory will in 1972 and that the original was retained by his counsel. On September 26, 1975, that original was delivered to the testator at his request by counsel and another proposed will prepared by counsel was presented for his signature. That proposed will was not signed, however.

According to the disputed testimony of a witness, later on the same afternoon of September 26, 1975, she saw the decedent destroy the statutory testament which had been delivered to him. She was the only witness to so testify.⁷⁴ The proponent of the testament adduced only circumstantial evidence to the contrary.

72. See 3 M. PLANIOL, CIVIL LAW TREATISE pt. 2, no. 2711 at 330 (11th ed. La. St. L. Inst. trans. 1959), cited in 410 So. 2d at 731 n.3; see also C. AUBRY & C. RAU, *supra* note 5, § 670.

73. 401 So. 2d 1055 (La. App. 3d Cir. 1981).

74. Her deposition was introduced by the defendants in lieu of her direct testimony. Plaintiff objected but ultimately called her on cross-examination and thoroughly covered the same points discussed in her deposition. The appellate court properly held that the admission of her deposition when she was available to testify was erroneous but

The trial court had believed the testimony of the witness who saw the destruction and thus had held that the testament had been revoked. The appellate court began its analysis by noting that in addition to the two methods of revocation found in the Civil Code,⁷⁵ the cases have added a third: physical destruction by the testator. Actually, this "third" method is a form of the tacit revocation found in the Civil Code itself.⁷⁶ In any event, the court properly saw its task as determining whether or not such destruction had actually occurred.

The court affirmed the proposition established in earlier decisions that when a testament is known to have been in the possession of or easily accessible to the testator prior to his death and then cannot be found, it may be presumed that it was revoked by the testator.⁷⁷ A proponent of the testament may overcome this presumption by showing "by clear proof" that there was a testament, its contents are known, and it in fact was never revoked by the testator.⁷⁸ As in most cases, the last requirement was the plaintiff's obstacle in *Brumfield*.

The court called the presumption of revocation a "weak" one, which is not an entirely accurate characterization.⁷⁹ Even at its

the error was "inconsequential" and did not affect the outcome. 401 So. 2d at 1059. Judge Cutrer, concurring, preferred not to dismiss the error so lightly, preferring instead to base the affirmance of the result below on the cross-examination by plaintiff, thus rendering "moot" any error which might have resulted from the admission of the deposition. *Id.* at 1060.

75. The two methods of revocation contained in the Civil Code are an express revocation in the form prescribed for testaments or a subsequent inconsistent donation or sale of the thing given in a prior testament. See LA. CIV. CODE arts. 1691-1696.

76. It is a tacit revocation under LA. CIV. CODE art. 1691 because it results from "some act which supposes a change of will."

77. See *Succession of Nunley*, 224 La. 251, 69 So. 2d 33 (1953), and authorities therein cited. See especially *Fuentes v. Gaines*, 25 La. Ann. 85 (1873), a very small part of the famous Louisiana succession case involving the succession of Daniel Clark. His daughter, Myra Clark Gaines, was ultimately successful in overcoming the presumption after more than a lifetime in the courts (she died before the case was finally resolved). Although the testament in question was never found, she proved its existence entirely by extrinsic evidence and established that it had been destroyed by persons other than the testator himself.

78. *Succession of Nunley*, 224 La. at 258, 69 So. 2d at 35; *Succession of O'Brien*, 168 La. 303, 121 So. 874 (1929). The clear proof in the latter case was that the olographic testament had been destroyed on the day after the death of the testatrix, along with her bed sheets, upon the order of the undertaker, because of their condition.

79. The court cited *Jones v. Mason*, 234 La. 116, 99 So. 2d 46 (1958), but in that case it was established that the testament was executed in multiple originals, that at least two of these were in the possession of the testator prior to his death, and that only one was found after his death. Under those circumstances, the court said the presumption of destruction by the testator would be "weak" at the most and would be overcome by the fact of possession of the other duplicate original.

diminished strength, the presumption was strong enough to outweigh the plaintiff's contrary proof, and the appellate court affirmed the trial court's holding that the testament in fact had been revoked by the testator.

An identical result obtained in *Succession of Bagwell*.⁸⁰ The facts were very similar to *Brumfield* up to a point. A valid statutory will had been executed by the testator and retained by counsel. On a given day, the testator obtained either the original or a copy of the testament from counsel, expressing some unhappiness with the intended legatees. Unlike *Brumfield*, there was no direct testimony of destruction of the will. It simply could not be located after his death, and thus the presumption discussed earlier was applicable. The proponent tried to show non-revocation by establishing that a nephew had actually destroyed the will. Again, the evidence failed to outweigh the presumption. Four witnesses, three of whom were clearly disinterested witnesses, testified that the decedent told them he had torn up the testament. Although it was proven that the nephew might have had an opportunity to destroy the testament, the court said there was no evidence that he did so or that he had any reason to do so.

DISINHERISON

It has commonly been said that since the 1941 decision in *Succession of Lissa*,⁸¹ there has been no successful disinherison of a child reported at the appellate level. *Lissa* imposed an almost impossible burden on heirs seeking to support a disinherison clause. It permitted a disinherison only upon those grounds specified by the Civil Code and then required that: (1) the testator must persist in his feeling until death, avoiding all contact with the child that could be construed as reconciliation, (2) the reason for disinherison must be stated in the testament, and (3) the remaining heirs must prove the facts upon which the disinherison is based.

This has proved to be an insurmountable burden, especially the requirement that no reconciliation occur. However, during this term in *Succession of Chaney*,⁸² all of the requisites were met and the appellate court affirmed the disinherison of the testator's son. About six months before his death, the testator wrote a valid will in which he specified the causes for which he was disinheriting his son, namely, striking a parent and being guilty of cruel treatment toward the parent. The testament left all of the testator's property to the other two children, less a small legacy to a granddaughter.

80. 415 So. 2d 238 (La. App. 2d Cir. 1982).

81. 198 La. 129, 3 So. 2d 534 (1941).

82. 413 So. 2d 936 (La. App. 1st Cir. 1982).

The will detailed the factual basis for the disinherison, especially an incident during 1979 in which the testator said he was struck by his son. After probate of the testament, the disinherited son filed suit against his siblings contesting his exclusion. The trial court concluded that the siblings had discharged the burden of showing that the 1979 incident occurred, and the court further concluded that the son had failed to discharge the burden of showing reconciliation.

As to reconciliation, the evidence consisted primarily of several visits the son allegedly made either to the hospital after surgery which the father had undergone or to the nursing home where he spent his last days. During some of these visits, the father may have been comatose and, in any event, he was so weak that he could not very well have protested the visits. The court held that a "merely passive action such as the testator allowing his son to visit him in a nursing home is not an act showing forgiveness."⁸³

The decision in *Chaney* may establish a more lenient view of disinherison than had previously been the case. Reconciliation had been so easily found in earlier cases that one was entitled to conclude that almost any contact would amount to reconciliation. The siblings' case was made easier by the fact that so little time elapsed between the disinherison and death, and a good deal of that time was spent by the testator in a weakened condition in a hospital or a nursing home. Thus there was very little opportunity for the kind of contact which might have led to reconciliation. In *Lissa*, the conduct on which the disinherison was based (marriage of a minor without consent of the parents) occurred more than thirty years prior to the death of the parents and a good deal of "water under the bridge" had passed by the time of their death, giving ample opportunity for reconciliation to be found. Thus resolution of the question of whether *Chaney* is a new departure may have to await a decision in which more than a brief time has elapsed between the conduct of the heir, the disinherison, and the death.

83. *Id.* at 941.